(16)

FILED
SEP 8 1942
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1942

No. 305

E. J. THOMAS, J. R. McDONALD, J. R. MASON, E. G. WILLIAMS, and A. C. CARPY,
Petitioners

vs.

EL DORADO IRRIGATION DISTRICT,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION THERETO

CHELLIS M. CARPENTER
Russ Bldg., San Francisco, Calif.
Attorney for Respondent

THOMAS MAUL,
Placerville, Calif.
Of Counsel

Subject Index

Brief of Respondent in Opposition Thereto 1

Opinion Below 1

Statement of the Case 1

Argument 6

There Was No Discrimination, No Secrecy and No Preference Granted the Receiver for the California National Bank, Nor Was There Any Lack of Good Faith in the Transaction..... 6

The Interlocutory Decree did Follow the Provision of the Act Even Though the Amendment Was Adopted Subsequent to the Conclusion of the Hearing. Any Deficiency in the Findings Was Corrected by the Ninth Circuit Court of Appeals..... 10

The Findings, Decree and Record Establish that the Plan Is Fair and the Same Can be Determined from the Record, the Findings and Decree 12

Conclusion 14

Table of Authorities Cited

CASES

American United Mutual Life Insurance Co. vs. City of Avon Park, 311 U. S. 138 10

Canright vs. General Finance Corporation, 35 Fed. Supp 841.... 8

Cook, In re, 104 Fed. (2d) 981 10

John Hancock Mutual Life Insurance Co. vs. Bartels, 308 U.S. 180 10

Lorber vs. Vista Irrigation District, 127 Fed. (2d) 628 13

Newhouse vs. Corcoran Irrigation District, 114 Fed. (2d) 690... 13

Roberts vs. Board of Public Instruction, 117 Fed. (2d) 943..... 8

Seim Construction Co., In re, 37 Fed. Supp 855..... 8

Taft, In re, 133 Fed. 511 5

Texas Hotel Corporation vs. Waco Development Co. 87 Fed. (2d) 935 10

Thomas et al vs. El Dorado Irrigation District, 126 Fed. (2d) 922, 926 .....1, 4, 14

U. S. vs. Greer Irrigation District, 121 Fed. (2d) 675 10

Zavelo vs. Reeves 227 U. S. 625 10

CODES AND STATUTES

Municipal Bankruptcy Act 2

National Bankruptcy Act, Sec. 24, subdivision b 5

Public 669, 76th Congress Sec. 3 (June 28, 1940) 3

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1942

No.

E. J. THOMAS, J. R. McDONALD, J. R. MASON, E. G. WILLIAMS, and A. C. CARPY,
Petitioners

vs.

EL DORADO IRRIGATION DISTRICT,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION THERETO

OPINION BELOW

The opinion of the Circuit Court of Appeals, Ninth Circuit, is reported in 126 Fed (2d) 922.

STATEMENT OF THE CASE

Respondent does not deem it necessary to furnish an entire new statement of the case, but will confine its statement

to an enlargement of the statement of facts made by petitioners.

In this statement the Respondent desires to call the Court's attention to the fact that two applications were made to the Reconstruction Finance Corporation by the Respondent District, the first having been an attempt to obtain a loan which would have permitted the payment of a larger amount to the bondholders than that finally agreed upon. That first petition was rejected by the Reconstruction Finance Corporation and a new petition filed, which petition was granted in an amount slightly less than the amount the District has agreed, in its plan of composition, to pay the bondholders; thus indicating that the District has always desired and attempted to pay the bondholders the greatest amount possible (the difference between the amount received from the Reconstruction Finance Corporation and the amount paid has been supplied by the District).

After the first Municipal Bankruptcy Act was held unconstitutional and prior to the adoption of the present Municipal Bankruptcy Act, the District did, on February 5, 1937, make an offer to the Receiver for the California National Bank and *to the petitioners herein*, offering to endeavor to obtain an increase in the loan from the Reconstruction Finance Corporation in an amount sufficient to pay the bondholders and warrant holders in "full the face value of their bonds, plus accrued interest, less 17½% discount on the total amount." The offer was accepted by the Receiver of the California National Bank, but was rejected by the petitioners herein as "not acceptable" (Transcript of Record, page 132)

Said offer was made at a time prior to the adoption of the Municipal Bankruptcy Act under which this proceeding was

held and when there was no relief available to the Respondent under the National Bankruptcy Act. The offer was not only rejected by the petitioners herein, but these identical petitioners continued harrassing the Respondent District with litigation, having filed one action against the Respondent District on the 8th day of March, 1937 and another one on the 26th day of March, 1937, (only a little more than a month after said offer was made). There is nothing in the record to indicate that the offer contained in the letter of February 5, 1937, was with drawn until the filing of the petition for confirmation of plan, October 7, 1938, twenty months after the offer by the District and acceptance by the Receiver for the California National Bank and after rejection by the petitioners.

Counsel for petitioners states the dates and recitals are important, and we agree with that statement. The importance of the dates and recitals, indicated by the foregoing statement, is apparent, and in view of some of the points made by petitioners, the following dates and recitals are equally important. The hearing in this case was held before the United States District Court on the 27th day of February, 1940, the hearing was concluded and the matter submitted on briefs and, as pointed out by the petitioners on page 6 of their petition, Sec. 3, Public 669, 76th Congress, was approved on June 28, 1940, four months after the conclusion of said hearing, although Findings in this case were not signed nor filed until March 8, 1941. Thus, at the time of the actual hearing the amendment referred to as requiring the careful examination of contracts, proposals, acceptances, deposit agreements and all other papers relating to the plan, was not in effect although the same was in effect when the Findings were signed and entered. However, there is evidence of record that there was at least a full and fair

disclosure upon which a Finding could be based. This, manifestly, is true, for in its decision the Circuit Court of Appeals said:

> "The petition of the District, the acceptance by the Reconstruction Finance Corporation, the stipulations entered into, and other exhibits make full disclosure of all matters concerning the relationship of the parties. The Reconstruction Finance Corporation, a Government agency, supplied the funds for the relief of the embarrassed debtor, to make the reorganization plan workable. The escrow agreements were all before the court. There was full disclosure. Indeed, the only omission that appellants' industrious scrutiny seems to have been able to discover, as asserted in their brief, is that the District in its petition had failed to separately state the amount of its warrant indebtedness and it is suggested that this was deliberately done in bad faith. However, this inadvertence was so evident that appellant, in reference to the omission, further says:
>
> 'It is so obvious that even the R. F. C. failed or declined to hide the fact that its 'acceptance' of the plan embraced the plan of warrant liquidation. * * * The Court authorized the 'purchase' of the warrants as well as the bonds. The plan of composition, if any, still explicitly includes the warrants'."
>
> Thomas et al vs. El Dorado Irrigation District, 126 Fed. (2d) 922, 926.

However, as pointed out by the Circuit Court of Appeals in this case, in the paragraph just following the foregoing quotation, the Court did make a finding which is as follows:

> "That all amounts to be paid by petitioner for services and expenses incidental to the composition of its indebtedness have been fully disclosed and are reasonable

and the offer of the plan and its acceptance are in good faith."

Transcript of Record page 257.

While the quotation, just given, appears in the Interlocutory Decree, nevertheless, it is an indication that the Court was acting with a full realization of the situation and full knowledge of all facts, and took cognizance of the fact that there had been a full and complete disclosure.

Should there be any question as to whether or not the Court properly found on that matter, an answer to that contention is that in its decision, the Ninth Circuit Court of Appeals corrected such failure by the statement made in its decision and hereinabove quoted. The power of the Circuit Court of Appeals to correct such errors can not be questioned for that is a power granted Circuit Courts of Appeal by the Bankruptcy Act itself.

Sec. 24, subdivision b of the National Bankruptcy Act provides as follows:

> "The several Circuit Courts of Appeal and the Court of Appeals of the District of Columbia shall have jurisdiction in equity, either interlocutory or final to *superintend and revise* (italics ours) in matter of law (and in matter of law and fact the matters specified in Sec. 25) the proceedings of the several inferior Courts of Bankruptcy within their jurisdiction."

Certainly the right to *superintend and revise* gave the Circuit Court of Appeals the right to supply any deficiency in the Findings.

In re Taft, 133 Fed. 511.

ARGUMENT

The petitioners make three points in support of their petition for Writ of Certiorari, said points being as follows:

1. That the plan of composition discriminates unfairly against the petitioners and in favor of the Receiver for the California National Bank, claiming a preference in favor of that creditor.

2. That the interlocutory decree did not follow the mandatory provision of the act requiring an investigation of the circumstances surrounding the deposit of securities and the question of compensation of fiscal agents claiming further that the failure to make a Finding on that question was fatal.

3. That the Findings and Decree failed to establish that the plan is fair and that the same can not be determined from the record, findings, or decree.

Respondent will answer these questions in the order presented.

There Was No Discrimination, No Secrecy, and No Preference Granted The Receiver For The California National Bank, Nor Was There Any Lack of Good Faith In The Trasaction.

As has been pointed out in the Respondent's statement of facts, the offer to settle on the basis of a discount of 17½% was made openly and fairly, and the petitioners in this case given the same opportunity as was afforded the Receiver for the California National Bank, but in the language of Counsel for petitioners the "offer was not acceptable by any of the re-

spondents herein." (The word "respondents" in that stipulation relating to the petitioners in this proceeding.) That statement appears in a stipulation as to facts filed on behalf of respondents in the Court below (petitioners in this proceeding.) The stipulation in question was prepared by the attorney for these petitioners and offered by him in evidence.

> Transcript of Record page 128 to 137. (The statement referred to appearing on page 132).

As has been pointed out before, not only was the offer rejected, but these identical petitioners continued to harrass the District with suits seeking judgment on these obligations until the Respondent District, shortly after the adoption of the new Municipal Bankruptcy Act, filed the petition which resulted in the proceedings now before this Court. Does Counsel contend that after having received an offer of compromise, and after he, acting on behalf of these petitioners, had commenced the two actions above mentioned, that the offer should have been held open even though the only non-consenting bonds of the District were in the hands of the petitioners (the petitioners were the plaintiffs in the action just mentioned)? The fact of the institution of these actions was neither disputed nor questioned in this proceeding and surely should be taken as a complete rejection of the offer.

However, we wish again to point out that the offer and acceptance by the California National Bank was made approximately twenty months prior to the filing of the petition in this case, and for that reason certainly can not be construed as a preference. Moreover, call the transaction a preference or whatever one likes, certainly it is not indicative of any bad faith or lack of good faith on the part of Respondent, for there was no secrecy about it, the same offer was made to petitioners,

and as the Court below said in the instant case, everything was open and above board. Certainly there was no attempt to defeat any of the purposes of the Bankruptcy Act or any portion thereof. It has been said that a preference is not in itself evil, but is merely one prohibited by the Bankruptcy Act.

Canright vs. General Finance Corporation, 35 Fed. Supp. 841. While it it is also recognized that the main purpose of the provisions of the Bankruptcy Act against preferences is to protect all creditors against secret preferential liens.

In re Seim Construction Co. 37 Fed. Supp. 855.

Petitioners cite the case of Roberts vs. Board of Public Instruction, 117 Fed. (2d) 943, and we feel that rather than being in support of the petition, that if the case is carefully read, it would support the position of the Respondent, for in that case it was the Appellant who was guilty of taking inconsistent positions, just as in this case, it is the petitioners who are now complaining of a preference they themselves rejected, not because of its inequity, but because of their desire to obtain an even greater preference. In the Roberts case the Court said that,

> "His predicament is a result of his own contriving under circumstances depriving it of equitable appeal."

Continuing, the Court said:

> "The appeal, if made under different circumstances, might well have prevailed. When, however, his situation is considered in the light of the circumstances which have brought the situation about, it is seen that the equity he claims is not the real equity of one caught without fault, in a bad situation, but only a pretended one. For his situation as a result of concert with, and attempted artifice

in the interest of Wright & Company, to block by appealing to equity, what they could not legally prevent, in order to extort recognition of their bonds which have been adjudged invalid. . . . . Proceedings in Bankruptcy are ruled by equitable considerations and the invoked provisions of the Act, that the plan must not discriminate unfairly in favor of any creditor or claims of creditors, has no application to this case. Compositions of all kinds under the original Bankruptcy Act, and as provided for in later acts, are grounded on questions of purest equity and proceedings under Statutes authorizing them have always required openness and fairness of dealing."

The Court then goes on to say that secret deals are frowned upon.

Now, where is the equity of petitioners' position and where was there any secrecy in the offer to the petitioners and the Receiver for the California National Bank? Surely the petitioners are not placing themselves in a favorable position when they come to this Court and say that, "one creditor obtained a preference over me, and I am denied the same treatment, my denial being caused by the fact that I rejected that preference and sought even a greater preference." We are certain that the petitioners are not instituting this proceeding in defense of the 96% of the bondholders who accepted the offer originally, nor are they carrying it on in defense of the Receiver of the California National Bank who received 82½%, but now their cry is that they have been deprived of the same treatment that was given that creditor after having had a full twenty months to accept and avail themselves of equal treatment. Other cases cited by petitioners in support of their cry of bad faith are

U. S. vs. Greer Irrigation District 121 Fed (2d) 675;
Zavelo vs. Reeves 227 U. S. 625;
Texas Hotel Corporation vs. Waco Development Co. 87 Fed (2d) 935;
John Hancock Mutual Life Insurance Co. vs. Bartels 308 U. S. 180;
American United Mutual Life Insurance Co. vs. City of Avon Park, 311 U. S. 138;
In re Cook 104 Fed (2d) 981;

None of said cases are in point herein. The Greer case being merely a case where the District and the land owners appeared in eminent domain proceedings in an attempt to increase the valuation. The Zavelo case involving the case of a promise made after the filing of a petition. The Texas Hotel case merely holding that the acquisition of claims to obtain a more favorable settlement was not inequitable. The City of Avon Park case holding that securities obtained under questionable circumstances should not be allowed a vote. While in the Cook case, the Appellee had filed a petition in order to escape jurisdiction of the State Court, and the Hancock case holding that the requirement of *good faith* hits at *secret efforts* to *favored creditors*. Certainly there was no secret effort and no favored creditors when these petitioners were offered the same favor that they now complain of.

The Interlocutory Decree Did Follow the Provisions of the Act Even Though the Amendment Was Adopted Subsequent to the Conclusion of the Hearing. Any Deficiency in the Findings Was Corrected by the Ninth Circuit Court of Appeals.

As pointed out in Respondents' statement of facts, there was a fair disclosure of all proceedings, none of the parties to

this matter were misled, and have at all times been fully advised of all matters. A full and fair disclosure was made to the Court and any lack in the Findings was certainly corrected by the Circuit Court of Appeals in the decision below. Counsel complains that there is no showing as to what compensation Paul W. Curtis, as secretary for the Bondholders' Protective Committee might have received or obtained, and since Counsel relies on the record which was prepared under his direction, it is desired to point out that there is no evidence regarding the employment of Paul W. Curtis or any other person as fiscal agent of the district; it is also desired to point out that the name "Paul W. Curtis" appears only twice in the record, once on page 75, in which Paul W. Curtis appears to have written a letter to F. N. Hosking, Engineer-Manager of El Dorado Irrigation District and again on page 88, where mention is made of the fact that Paul W. Curtis was Secretary of a Bondholders' Protective Committee. The last reference appears in Exhibit 5 attached to the District's Stipulation of Facts, said Exhibit 5 being an application to the Reconstruction Finance Corporation filed in August of 1933 (transcript of record, pages 80 to 94 inclusive) there being no reference to Mr. Curtis having acted in any other capacity.

Furthermore, it is respectfully submitted that the consent of the creditors is based upon the consent of the Reconstruction Finance Corporation, bearing date of the 2d day of September, 1938, (transcript of Record, pages 19 to 22 inclusive) the Reconstruction Finance Corporation having purchased said bonds and all warrants, pursuant to an order of the United States District Court, which appears in the transcript of record, pages 64 to 67 inclusive. Prior to such purchase, said bonds were deposited with the Bank of America National Trust & Savings Associa-

tion in escrow, the form of the deposit being shown by the Escrow Agreement appearing in the Transcript of record, pages 68 to 71 inclusive.

Surely it cannot be contended that Mr. Curtis was acting as the negotiating agent of the Reconstruction Finance Corporation.

However, as we have indicated in the Statement of Facts, the Trial Court, in its Interlocutory Judgment, did find that the amounts to be paid were reasonable and were there any deficiency in the findings, the same was supplied by the Circuit Court of Appeals.

The Findings, Decree and Record Establish That the Plan Is Fair and the Same Can Be Determined From the Record, the Findings and Decree.

This case was tried in a few hours, and both the Respondent District (petitioner in the District Court) and the petitioners in this Court (Respondents before the District Court) prepared lengthy stipulations as to facts and then supplemented those stipulations as to facts with such additional evidence as was necessary. These stipulations fully cover the entire situation and certainly are a fair disclosure.

It is not disputed that the Reconstruction Finance Corporation is now the owner of all of the warrants and all but twenty of the bonds, which twenty are held by the petitoners herein. The facts clearly show that the Respondent District in this case did not, because of an agreement with the bondholders, levy taxes and charge water tolls in an amount sufficient to pay the entire interest on its bonded indebtedness, but levied a tax rate and collected a water toll which it was agreed was all the land owners and water users were able to pay.

It is desired to point out that the bonds which were being retired under this proceeding had a market value of not more than $230.00 per bond when the RFC loan was granted, being less than 50% of the amount the bondholders are realizing under the plan of composition, which in itself indicates its fairness, the fact that 96% of the bondholders had consented also being an indication of the fairness of the plan.

The petitioners complained because the assessed value of the lands in the District exceed the amount of the bonded indebtedness, and we wish to point out that they have no lien or claim on the District's assets; that the assets of the District are only valuable to the District, and that the value of both the lands and the District's assets are dependent upon the continued operation of the District.

All these matters were before the Circuit Court of Appeals and before the District Court and were fully considered by it.

Counsel for petitioners does not seem to be able to distinguish the difference between a "composition" of this kind and actual bankruptcy, but at least one of the cases cited by Counsel for petitoners indicates that there is a vast difference between the bankruptcy of a Public Entity and the bankruptcy of a private person.

See Lorber vs. Vista Irrigation District, 127 Fed. (2d) 628;

Newhouse vs. Corcoran Irrigation District 114 Fed (2d(690;

In the Lorber case, after quoting from the Newhouse case, the Court points out that in these cases the test is the ability or inability of the District to pay, and while that case was remanded, it was remanded for the sole purpose of enabling the Court to make a finding as to whether or not the District could pay

more, leaving it to the discretion of the Court as to whether that finding be made with or without the taking of additional evidence; but in the present case the Circuit Court of Appeals corrected any failure of the District Court when, in denying a petition for re-hearing, it added the following sentence to the decision:

> "It is apparent from the record that the amount to be the bondholders of 50½ cents on the dollar is all that can reasonably be paid under the circumstances."
>
> 126 Fed (2d) 922.

See Petitioners' brief in support of petition for Writ of Certiorari, Page 27.

CONCLUSION

There being no important questions of law to determine, no conflict in decisions, no errors which need correcting, no lack of good faith and no unfairness, it is respectfully submitted that the petition should be denied.

Dated: Placerville, California, August 29, 1942.

CHELLIS M. CARPENTER
Counsel for Respondent.

THOMAS MAUL
Placerville, California
Of Counsel